Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Petitions, Applications and Related	)	MMB File No. 900418A
Pleadings Regarding the Prime Time	)	MMB File No. 870622A
Access Rule	)	MMB File No. 920117A

To: The Commission

COMMENTS OF VIACOM INC.

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June 14, 1994

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SUMMARY

The Prime Time Access Rule (PTAR) has helped promote diversity by creating a strong syndication marketplace and increasing the viability of independent stations. Before the Commission considers any changes to this successful regulation, it should first build a full and complete record regarding the effects of recent and ongoing changes in the video marketplace and the role PTAR plays in promoting the public interest.

Significant public interest issues, including the very viability of independent stations and independent producers, will be at stake in any examination of PTAR. As the Commission itself has noted, elimination of the financial interest and syndication ("finsyn") rules affects both. Yet the Commission does not and will not know the full effect of the relaxation and scheduled sunset of those rules for several years. Before proposing any changes to PTAR, the Commission must take a hard look at that new syndication marketplace to ensure that diversity continues to be served.

Constitutional challenges to PTAR based on the Commission's fairness doctrine elimination are specious and ill-founded. First Amendment challenges to PTAR were rejected long ago and have not been subsequently overruled. Further the courts have expressly ruled that the Commission's fairness doctrine decision was based on policy, rather than constitutional, grounds.

PTAR has promoted diversity by fostering the vibrant first-run syndication industry that exists today. Without finsyn or PTAR, this industry is threatened. The same is true of independent stations. PTAR has facilitated their growth, both in number and strength. Without PTAR those stations' contributions to diversity, particularly in local and public affairs programming, will be threatened. Further, weaker independent stations reduce the likelihood of success for the Commission's longstanding policy goal of promoting new broadcast networks.

The Commission should issue a Notice of Inquiry (NOI) to examine PTAR's continuing role in promoting diversity in the changing video marketplace. Because finsyn and PTAR serve or served many of the same public interest values, proposals to modify PTAR should be made only after a comprehensive record encompassing the actual effects of finsyn relaxation and elimination is formed. Any modifications to PTAR before that time would be speculative, premature, and risk irreparable harm to the public interest.

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To: The Commission

Comments of Viacom Inc.

Viacom Inc. ("Viacom") hereby submits the following Comments in response to the Commission's April 12, 1994 Public Notice seeking comments on the above-captioned requests and applications and their associated pleadings.

INTRODUCTION

The Commission has received three requests seeking changes in or elimination of the Prime Time Access Rule ("PTAR"). 47 C.F.R. § 73.658(k). That rule prohibits network-affiliated stations from filling more than three of the four prime time hours with network programming and precludes network affiliates in the top fifty markets from airing programs previously aired on a network ("off-network programs") during the access period.[1] In adopting this rule, the Commission stated the following objectives:

- "to provide opportunity -- now lacking in television -- for the competitive development of alternate sources of television programs;"[2]

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[1] Exceptions are made for certain types of programs (e.g., news, public affairs, documentaries, and children's programs). See 47 C.F.R. § 73.658(k).

[2] Report and Order, 23 FCC 2d 382, 397 (1970)("PTAR Order").

- to provide access in the top fifty markets to create "an adequate base of television stations to use [independent] product;"[3] and
- to "provide a healthy impetus to the development of independent program sources, with concomitant benefits . . . for independent stations."[4]

It is Viacom's belief that these purposes are still valid and deserving of government support. Nevertheless, Viacom recognizes that the television production and distribution markets have undergone many changes since PTAR's adoption. Accordingly, for the reasons stated below, Viacom recommends that the Commission initiate a Notice of Inquiry examining that changing syndication marketplace ***before*** considering the merits of the above-captioned requests.

I. A Comprehensive Review of the Changing Syndication Marketplace Is Appropriate.

Significant changes in the syndication marketplace have occurred since PTAR was adopted in 1970. Independent stations have grown in number and strength, from 122 independent stations (including noncommercial stations) in 1970[5] to over 300 commercial independent stations in 1993.[6] A strong, vibrant syndication industry has developed, with over 130 advertiser-supported syndicated series airing in 1993.[7] PTAR has been a major contributor to these developments. At the same time, there has also been explosive growth in the number of alternative outlets, such as cable networks, for syndicated programs.[8] Yet none of these changes have been examined in the context of their effect on access period syndication and PTAR.

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[3] Id. at 386.
[4] Id. at 397.
[5] Id. at 385.
[6] Broadcasting and Cable Yearbook 1993, Volume I, p. C-122.
[7] Broadcasting and Cable, Jan. 24, 1994, p. 96.
[8] Cable television now offers more than 80 different networks to over 60% of all U.S. television households. Overview of the Television Industry, Mass Media Bureau, p. 1 (FCC 1992).

In view of these facts, the Commission should first issue a Notice of Inquiry ("NOI") examining the modern syndication marketplace ***before*** considering any proposals to modify, eliminate, or retain PTAR. This inquiry should encompass the current and future status of independent stations and the first-run syndication industry and the contributions to diversity made by each. The NOI should also examine the effects on diversity of the Commission's relaxation of its financial interest and syndication rules and the scheduled sunset of the network domestic syndication ban.

A. Prior Examinations of the Video Marketplace Are Outdated and Did Not Focus on Access Period Syndication.

The Commission's 1990-1993 examination of the financial interest and syndication ("finsyn") rules[9] specifically declined consideration of PTAR: "We did not propose, and we shall not, revisit or revise the PTAR in this proceeding."[10] Similarly, the Commission's 1992 Video Marketplace Review also expressly declined to address PTAR: "[C]ommenters have addressed a variety of . . . issues, including . . . the prime time access rule. A number of these matters are already the subject of other proceedings or are sufficiently discrete to warrant separate analysis and are thus not discussed herein."[11]

Despite receiving unsolicited comments on PTAR in both proceedings, the Commission has not sought comment nor built a sufficient record from which it can make an informed judgment on any proposals to modify, eliminate, or retain PTAR. Given the important public interest values PTAR was designed to serve, particularly those of promoting diversity through strong independent stations and a strong first-run syndication industry, the Commission should first gather and analyze contemporary information

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[9] See Report and Order in MM Docket No. 90-162, 6 FCC Rcd 3094 (1991), as modified, Memorandum Opinion and Order, 7 FCC Rcd 345 (1991), as amended, Second Report and Order, 8 FCC Rcd 3282 (1993)("1993 Finsyn Order"), reconsid. denied, 8 FCC Rcd 8270 (1993), pet. for review pending, Capital Cities/ABC v. FCC, No. 93-3458 (7th Cir., filed May 24, 1993).

[10] Notice of Proposed Rulemaking in MM Docket 90-162, ¶ 34 (October 22, 1990)("1990 Finsyn NPRM").

[11] Notice of Proposed Rulemaking in MM Docket No. 91-221, note 4 (June 12, 1992)(emphasis added)("Video Marketplace NPRM").

concerning those public interest values before any proposals to modify, eliminate, or retain the rule are considered.

B. The Actual Effects of the Commission's Elimination of the Financial Interest and Syndication Rules Must Be Included in the Comprehensive Review.

Significant public interest issues, including the very viability of independent stations and independent producers, will be at stake in any examination of PTAR. Elimination of the finsyn rules affects both. Yet the Commission does not and will not know the full effect of the elimination of those rules for several years.

1. The Pending 7th Circuit Decision

The Commission's financial interest and syndication rules have a long and tortured history.[12] The most recent version of those rules[13] is currently the subject of a legal challenge pending in the U.S. Court of Appeals for the Seventh Circuit. Oral arguments in that case are scheduled for June 14, 1994, with a ruling possible anytime thereafter. In the Commission's own words, that ruling could "be critical in determining what further action, if any, might be appropriate with respect to the prime time access rule."[14]

The finsyn rules were initially adopted "essentially to prevent indirect circumvention of the prime time access rule, and to encourage the 'development of diverse and antagonistic sources of program service.' " Mount Mansfield Television, Inc., 442 F.2d. 470, 476 (2nd Cir. 1971)(footnote and internal citation omitted). Even in relaxing those rules the Commission maintained its concern for a strong first-run syndication market and commercially viable independent stations by extending its ban on network syndication:

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[12] See Answer of the Federal Communications Commission to Petition for a Writ of Mandamus, D.C. Cir. No. 94-1080, pp. 2-4 ("FCC Answer").

[13] 1993 Finsyn Order, supra note 9.

[14] FCC Answer, supra note 12, at 5 (footnote omitted).

> a continued prohibition on active syndication of first-run programming . . . [is] necessary because: (1) local broadcast stations need an unimpeded supply of first-run programming to compete with network and off-network programming in various non-prime-time periods; (2) allowing the networks into first-run syndication could enable them to exploit their owned and operated stations and their web of affiliates serving the entire United States to handicap the launch of new first-run programs by independent syndicators, which would be detrimental to the maintenance of a diverse, competitive marketplace; (3) allowing the networks into first-run syndication could undermine the objectives of the prime time access rule; and (4) by virtue of the market structure, network involvement in first-run syndication could diminish the amount of independent first-run programming aired on local stations.[15]

Clearly, both the finsyn and prime time access rules serve or served many of the same purposes: a strong, independent first-run syndication marketplace; promotion and maintenance of diversity, particularly in programming aired on local stations; and prevention of anticompetitive abuses by the networks in the syndication marketplace. As the Commission has stated:

> Historically, the principle behind our network syndication restraints has been to ensure that alternative, non-network broadcast outlets receive access to the quality programming that they need to survive. We have been concerned that networks acting as syndicators would unfairly influence the program distribution market to the benefit of their affiliates and the detriment of competing independent stations. . . . [B]efore we remove all restrictions, we want to be certain that such an action will not harm local independent stations. For we are concerned that the harm that may result if we are wrong, would most greatly affect independent stations and the significant role they play in providing service to the public.[16]

The Commission must take a hard look at the new syndication marketplace and ensure that the above policy goals continue to be met before even considering any changes to PTAR. At the very least, the Commission should postpone issuance of an NOI on the syndication marketplace until after the Seventh Circuit has issued its finsyn decision. Even then (and as discussed in more detail below) there will not be sufficient marketplace data available on which to make well-informed proposals for modifications of PTAR.

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[15] 1993 Finsyn Order, supra note 9, at ¶ 94.

[16] Id. at ¶ 73 (footnote omitted).

2. The 1995 Finsyn Review

Absent Commission action to the contrary, the ban on network syndication of prime time and first-run programming sunsets in November 1995. Six months prior to that sunset, the Commission will conduct a review to determine if the ban need be retained with the burden on those favoring retention to overturn the ban's otherwise automatic repeal.[17] The Commission has suggested it will coordinate any rulemaking to modify or repeal PTAR with this finsyn review.[18]

That review may reveal the effect of indirect network entry (i.e., through network ownership interests) into the domestic syndication marketplace. However, because the networks are not yet allowed to actually syndicate programs, the review will not include any factual evidence with respect to direct network syndication practices or affiliate favoritism. Moreover, since syndicated sales of off-network programs usually do not begin until the third year of a network run, it is highly unlikely that the Commission will have factual evidence of even indirect network syndication practices available for its review.

In its 1993 order modifying the finsyn rules, the Commission stated that:

> [w]ithout the syndication ban, we believe that there is a risk that the networks could engage in affiliate favoritism. For example, by steering an off-network 'hit' to an affiliate, the network engenders goodwill with its affiliate and presumably helps the performance of that station, which may help to boost overall network ratings. The potential for this market behavior further supports our decision to prevent active syndication.[19]

At the time of its review, the Commission will have little or no data on network syndication practices and their potential detrimental effects on diversity through the practices mentioned above.

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[17] Id. at ¶¶ 117-118.

[18] FCC Answer, supra note 12, at 5.

[19] 1993 Finsyn Order, supra note 9, at ¶ 82.

In short, the 1995 finsyn review will be too early to be of any significant value with respect to even making proposals for modifications of PTAR. The market will be going through significant changes that will directly affect the goals served by PTAR. The Commission should wait until these effects are known before proposing any changes to PTAR.

3. Effect of the Scheduled Network Syndication Ban Sunset

Barring Commission action to the contrary, networks will be allowed to actively participate in the domestic syndication marketplace after November 1995. However, there is unlikely to be significant network entry into that market until at least three years later -- because syndicated sales of successful series do not occur until the series' third year. Thus, it will be the spring of 1998, at the earliest, before there is sufficient network entry into the off-network syndication marketplace to allow the Commission to gauge the effects of that entry.[20]

With the sunset of the network syndication ban, PTAR will be the one remaining protection for network affiliates from unfettered network control of the entire prime time schedule and for independent television stations against anticompetitive practices by networks in syndicating off-network programs. The Commission itself has recognized the significant harm that could occur without some restrictions on network syndication: "networks acting as off-network syndicators would have both the incentive and the ability to favor their affiliates in particular markets to gain not only an immediate revenue benefit, but also a long-term competitive edge in those markets."[21]

PTAR will prevent networks from syndicating off-network product to their affiliates (or any network's affiliates) in the top fifty markets. This prohibition will greatly

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[20] It is possible that the networks may have reserved domestic syndication rights in series for the upcoming (1994-95) television season. If so, the first demonstrable evidence of the networks' syndication of such programs would not be available until the spring of 1997. A Commission NOI could ascertain what, if any, network syndicated sales may occur at that time.

[21] 1993 Finsyn Order, supra note 9, at ¶ 80.

reduce the likelihood of affiliate favoritism that could cause significant harm to competition and diversity.

Sunset of the network syndication ban while PTAR is still in place will make it possible for the Commission to learn the networks' actual domestic syndication practices without irrevocably harming the first-run syndication marketplace or independent stations. As noted above, these practices will not begin in any significant way until three years after the sunset occurs. Any proposals to modify PTAR prior to that time would be speculative and premature.

II. The Constitutionality of PTAR Has Not Been Undermined by the Commission's Fairness Doctrine Decision.

First Amendment challenges to PTAR were rejected long ago. Mount Mansfield, 442 F.2d 470 (2nd Cir. 1971). More recent claims that rules closely related to PTAR, the financial interest and syndication rules, violate the First Amendment have been similarly rejected:

> [A]lthough as an original matter one might doubt that the First Amendment authorized the government to regulate so important a part of the marketplace in ideas and opinions as television broadcasting, the Supreme Court has consistently taken a different view.[22]

Contrary to First Media's assertion,[23] the Commission's 1987 fairness doctrine decision does not undermine that constitutionality. The courts have ruled that the FCC's fairness doctrine repeal was based on a policy, rather than constitutional, analysis: "The FCC's decision that the fairness doctrine no longer serves the public interest is a policy judgment." Syracuse Peace Council v. FCC, 867 F. 2d 654, 660 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). Indeed, in upholding that decision the court refused to even address the merits of the Commission's constitutional analysis. Syracuse Peace

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[22] Schurz v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992)(citations omitted).

[23] First Media Corporation, Petition for Declaratory Ruling, MMB File No. 900418A (April 18, 1990).

Council, supra, at 659. Thus, the Commission's fairness doctrine elimination was not based on constitutional factors. Accordingly, First Media's claim that PTAR is unconstitutional because of the fairness doctrine elimination is in error; the constitutionality of PTAR has not been called into question by the Commission's fairness doctrine decision.

Further, petitioners' view that Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), has been abrogated by the Commission's fairness doctrine decision would call into question the constitutionality of **all** broadcast programming regulation -- a result the FCC specifically avoided. See Syracuse Peace Council, supra, at 659. In fact, the "Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its 'regulations designed to promote diversity.' "[24] Moreover, since the Commission's fairness doctrine decision, the Supreme Court has cited Red Lion with approval. Metro Broadcasting, supra note 24, at 3010. In short, petitioner's constitutional arguments are specious and ill-founded.

III. PTAR's Off-Network Restriction Is the Foundation of Its Success and Its Repeal Is Contrary to the Public Interest.

As noted in Part IA above, PTAR has created a healthy and vibrant first-run marketplace by freeing up one hour of prime time on the schedule of the top fifty market affiliates for first-run programming. Access to the top network affiliates is the foundation of this market: a first-run program cannot be successful without sales to network affiliates in the top fifty markets. In fact, when the Commission first adopted the rule, it stated that access to stations, particularly affiliates in the top fifty markets during the crucial prime time evening hours, is the key to a healthy first-run syndication industry.[25]

PTAR has also strengthened independent television stations by facilitating their access to popular and profitable off-network programming. Independent stations continue

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[24] Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997, note 41 (1990).

[25] PTAR Order, supra note 2, at ¶ 21.

to rely almost exclusively on off-network syndicated programming to counterprogram network and affiliate programming during early fringe time.[26] No other programming is a close substitute for off-network programming.

Off-network programming is significantly more attractive to independents than first-run programming. First, off-network programming is a known, proven commodity. A station's risk is reduced considerably because it is buying a program with proven ability to draw an audience and/or a particular segment of the audience. Second, because the program is a proven commodity known to the audience, it is easier to promote, particularly when the off-network program is still appearing on the network schedule. Third, network programming is still the high-budget, top quality segment of the program supply market.

The access period is the time when independent stations remain most competitive with affiliates and derive substantial proportions of their overall advertising revenue. Indeed, the period from 6 to 8 p.m. "is the single greatest revenue producing period for most independent stations."[27] These funds help independent stations finance the production of local news and public affairs programming. Elimination of PTAR will reduce, and possibly eliminate, independent stations' ability to produce those programs, thereby harming diversity.

By keeping independent stations stronger than they would be otherwise, PTAR also enhances the prospects of success for new broadcast networks. Independent UHF stations were the backbone of the nascent Fox network and are the ones most likely to affiliate with the soon to be launched Paramount and Warner Brothers Networks. PTAR will help keep affiliates of these new networks financially viable, thereby increasing the

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[26] Further Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162, November 21, 1990, Exhibit 2, p. 1.

[27] Reply Comments of the Association of Independent Television Stations, Inc., MM Docket No. 90-162, August 1, 1990, at pp. 18-19.

chances for those networks' success. This helps accomplish another longstanding Commission goal: promoting the emergence of new broadcast networks.[28]

PTAR has served and continues to serve many of the Commission's public interest goals.[29] Repeal of the off-network syndication restriction will impair independent stations' ability to produce local news and public affairs programs, preclude the successful launch of any new first-run programs, and reduce the likelihood of success for new networks. Each would significantly reduce the diversity of program choices available to the American viewing public.

CONCLUSION

A Notice of Inquiry to determine the state of the syndication marketplace and the competitive status of independent stations is the appropriate first step in any Commission review of the prime time access rule. Such NOI should include an examination of the effects on PTAR of the finsyn relaxation and the scheduled November 1995 sunset of the network domestic syndication ban. Ideally, those reviews should not be concluded until the networks' actual domestic syndication practices are known.

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[28] See, e.g., 1993 Finsyn Order, supra note 9, at ¶¶ 74-86.

[29] Because most independent stations are UHF stations and PTAR has helped make those stations more financially viable, PTAR has also helped narrow the disparity between VHF and UHF stations, another longstanding Commission goal.

Finally, PTAR has promoted and continues to promote the public interest. Any repeal of PTAR's off-network restrictions is contrary to the public interest as it would negatively impact independent stations and the first-run syndication industry and thereby reduce diversity.

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CERTIFICATE OF SERVICE

I, Joel T. Timmer, do hereby certify that true and correct copies of the foregoing Comments were served this 14th day of June 1994 by first class mail, postage prepaid, upon the following:

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